

WHAT KEITH BUSH'S EXONERATION TEACHES US ABOUT WRONGFUL CONVICTIONS[▽]

*Oscar Michelen, Esq.**

Keith Bush spent 33 years in prison for the attempted rape and murder of a 14-year-old girl on Long Island.¹ He was exonerated at an emotional court hearing in Suffolk County.² For those interested in working in the field of wrongful convictions, or those who just have a general interest in these types of cases, Mr. Bush's case presents a microcosm of the criminal justice system's flaws and an example of what it takes to overturn a decades-old conviction. What follows are some of the key principles that are illuminated in the case.

I. PEOPLE – ESPECIALLY YOUNG PEOPLE – DO FALSELY CONFESS TO CRIMES THEY DIDN'T COMMIT

DNA evidence has shown that people falsely confess to crimes they did not commit.³ Nearly a quarter of all DNA exonerations involve a person who confessed to the crime.⁴ Some of the most high-profile exonerations – those of the Central Park Five⁵; Marty Tankleff;⁶

[▽] This essay is based on the comments from the symposium and a blog post which is available at: <https://courtroomstrategy.com/2019/05/what-keith-bushs-exoneration-teaches-us-about-wrongful-convictions/>.

* Oscar Michelen is a partner at Cuomo LLC, with extensive litigation experience in Federal and State courts particularly in commercial litigation, intellectual property, municipal liability, white collar criminal defense and representing management in labor and employment litigation. He has exonerated six men in five cases over the past fourteen years.

¹ Arielle Dollinger, *No One Would Listen: Cleared of Murder After 33 Years*, N.Y. TIMES (May 22, 2019), <https://www.nytimes.com/2019/05/22/nyregion/murder-conviction-vacated-keith-bush.html>.

² *Id.*

³ Saul M. Kassir, Steven A. Drizin, et al., *Police-Induced Confessions: Risk Factors and Recommendations*, AMERICAN PSYCHOLOGICAL ASSOCIATION (July 15, 2009), <https://web.williams.edu/Psychology/Faculty/Kassir/files/White%20Paper%20online%20%2809%29.pdf>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Jeffrey Deskovic;⁷ and David McCallum⁸ all involved false confessions, and all by men under the age of 18. The Innocence Project cites several reasons why this occurs,⁹ such as:

- Real or perceived intimidation of the suspect by law enforcement;
- Use of force by law enforcement during the interrogation, or perceived threat of force;
- Compromised reasoning ability of the suspect, due to exhaustion, stress, hunger, substance use, and, in some cases, mental limitations, or limited education. Young people who do not understand their rights and are taught to please authority figures are particularly vulnerable;
- Devious interrogation techniques, such as untrue statements about the presence of incriminating evidence; and
- Fear, on the part of the suspect, that failure to confess will yield a harsher punishment.¹⁰

II. WHO THE DA IS MATTERS

Suffolk County District Attorney, Tim Sini, formed a unit to examine wrongful convictions in Suffolk County.¹¹ While it does not yet measure up to the level set by the Conviction Review Unit in Brooklyn, at least the unit exists and is looking at cases.¹² The previous District Attorney, Thomas J. Spota, was known to fight tooth and nail against overturning a wrongful conviction regardless of the evidence – once again, look at Marty Tankleff’s case.¹³ Mr. Tankleff was 17 years old when he was tried and convicted for the murder of his parents.¹⁴ The police had no motive and the only evidence connecting him to the crime

⁷ *Id.*

⁸ John Marzulli, *Brooklyn man wrongfully convicted of murder files \$50M lawsuit against widow of NYPD detective who forced confession*, NY DAILY NEWS (Oct. 13, 2015), <https://www.nydailynews.com/new-york/brooklyn/wrongfully-convicted-brooklyn-man-files-50m-lawsuit-article-1.2396324>.

⁹ *False Confessions & Recording Custodial Interrogations*, INNOCENCE PROJECT, <https://www.innocenceproject.org/false-confessions-recording-interrogations/>.

¹⁰ *Id.*

¹¹ *Conviction Integrity Bureau*, SUFFOLK COUNTY DISTRICT ATTORNEY’S OFFICE, <https://suffolkcountyny.gov/da/About-the-Office/Bureaus-and-Units/Conviction-Integrity-Bureau>, (last visited Feb. 22, 2021).

¹² *Id.*

¹³ Paul Vitello and Bruce Lambert, *Long Island Man Won’t Be Tried Again in Murders*, N.Y. TIMES (Jan. 3, 2008), <https://www.nytimes.com/2008/01/03/nyregion/03tankleff.html>

¹⁴ *Id.*

was a confession taken by the Suffolk County Police Department.¹⁵ Mr. Tankleff refused to sign the confession and recanted it almost immediately.¹⁶

A Suffolk County Judge granted Mr. Tankleff a hearing to examine newly discovered evidence pointing to a business partner of Tankleff's father as the perpetrator.¹⁷ The District Attorney's Office strongly contested the hearing, resulting in the judge deciding not to overturn the conviction.¹⁸ An appeals court overturned the decision and granted Mr. Tankleff a new trial.¹⁹ The case was then reviewed by then New York State Attorney General Andrew Cuomo whose office reinvestigated the case and found further evidence establishing Tankleff's innocence.²⁰ Spota then decided to drop the charges.²¹ This is why it is essential that every District Attorney's office in the country, but especially those working in high-population jurisdictions, need a Conviction Review Unit of some kind.²² Moreover, every Conviction Review Unit needs independent oversight and proper staffing to look under the rocks and look for cases where the system failed.²³ After reviewing Bush's case, Sini called the review and reversal of Bush's conviction for murder, "a window into a very dark aspect of Suffolk County's history."²⁴ Prosecutors need to be willing to look into that window.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² John Hollway, *Conviction Review Units: A National Perspective*, Faculty Scholarship at Penn Law (Apr. 2016), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship

²³ *Id.*

²⁴ Associated Press, *Conviction tossed for man held 33 years for New York murder*, FOX NEWS (May 22, 2019), <https://www.foxnews.com/us/conviction-tossed-for-man-held-33-years-for-new-york-murder>.

III. PERSISTENCE

Rarely does the first attempt to overturn an old conviction succeed, particularly in cases where there is no DNA evidence available that can quickly clear a defendant.²⁵ In this case, Mr. Bush's lawyer Adele Bernhard, who runs the Post-Conviction Innocence Clinic at my alma mater, New York Law School, has worked for over ten years to get Mr. Bush's case overthrown.²⁶ She made successive requests for documents and kept going after witnesses.²⁷

In all these post-conviction cases referenced earlier – Jeffrey Deskovic, David McCallum, Marty Tankleff, The Central Park Five – the defendants had exhausted all legal remedies and appeals.²⁸ In most wrongful conviction cases, before the final successful motion was made, several earlier post-conviction motions were rejected.²⁹ One of the hallmarks of the innocent who are wrongly convicted is that they are persistent; they consistently fight their convictions and doggedly seek help in getting justice.³⁰

IV. WHILE THERE ARE MANY REASONS WHY THIS HAPPENS, BIAS ON THE PART OF THE POLICE IS A MAJOR ISSUE

In our criminal justice system, there is racial and class bias.³¹ In fact, in the Bush case, District Attorney Sini's Office reported that the arresting officer, Detective August Stahl, referred to Mr. Bush as a "fucking n*****" who "should have been executed" during their re-

²⁵ *Reversing a Conviction*, FINDLAW (Mar. 19, 2019), <https://criminal.findlaw.com/criminal-procedure/reversing-a-conviction.html>; Editorial Board, *Opinion: Two Extraordinary Exonerations Show the Failure of Our Justice System*, THE WASHINGTON POST (July 21, 2019), https://www.washingtonpost.com/opinions/two-extraordinary-exonerations-show-the-failure-of-our-justice-system/2019/07/21/155f86d6-aa43-11e9-86dd-d7f0e60391e9_story.html

²⁶ Associated Press, *supra* note 24.

²⁷ Dollinger, *supra* note 1.

²⁸ Dollinger, *supra* note 1; Editorial Board, *supra* note 25.

²⁹ Editorial Board, *supra* note 25.

³⁰ *Id.*

³¹ Brandon Vaidyanathan, *Systemic Racial Bias in the Criminal Justice System is Not a Myth*, THE PUBLIC DISCOURSE (June 29, 2020), <https://www.thepublicdiscourse.com/2020/06/65585/>.

investigation into the case.³² Additionally, there is confirmation bias – that is, once a police officer believes he has the right guy or doesn't like the way he looked when answering questions, they do not keep an open mind.³³ They will, after that, ignore exculpatory evidence or go through hoops to explain why it is irrelevant.³⁴

District Attorney Sini's report, filed with the court in support of vacating the conviction, states, that all the physical evidence contradicted Mr. Bush's confession, and much of it pointed away from Mr. Bush.³⁵ For example, the alleged murder weapon, a metal hair pick found in Mr. Bush's house, could not have made the marks on the victim's body and an autopsy revealed that the victim had been stabbed after she already died by other means while Bush confessed to killing her by stabbing her with the hair pick. Moreover, the police and prosecutors ignored another suspect and hid it from the defense attorney.³⁶ The other suspect, when confronted with his comb being found next to the body, told the police he tripped over the dead body on his way home, and his comb must have dropped out of his pocket.³⁷ Yet, Detective Stahl recently told the NY Post he remains "100%, 200%, 1000%" convinced of Mr. Bush's guilt.³⁸

³² The editors of *Journal of Race, Gender, and Ethnicity* use the designation n**** and are not quoting Detective Stahl directly. For a discussion of the history of the use of the offensive epithet as a tool for racial oppression. See Gregory S. Parks & Shayne E. Jones, "Nigger": A Critical Realist Analysis of the N-Word Within Hate Crimes Law, 98 J. CRIM. L. & CRIMINOLOGY 1305, 1317 (2008); Ken Otterbourg, *Keith Bush*, THE NATIONAL REGISTRY OF EXONERATIONS (Aug. 18, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5570>.

³³ Dale Chappell, *Tell Me What I Want to Hear, Not What I Need to Hear: How Confirmation Bias Causes Wrongful Convictions*, CRIMINAL LEGAL NEWS (Nov. 16, 2019), <https://www.criminallegalnews.org/news/2019/nov/16/tell-me-what-i-want-hear-not-what-i-need-hear-how-confirmation-bias-causes-wrongful-convictions/>.

³⁴ Jacob Sullum, *How Confirmation Bias Sends Innocent People to Prison*, REASON (July 24, 2019), <https://reason.com/2019/07/24/how-confirmation-bias-sends-innocent-people-to-prison/>

³⁵ Dollinger, *supra* note 1.

³⁶ Dollinger, *supra* note 1.

³⁷ *Id.*

³⁸ *Id.*

V. WE NEED TO RECORD ALL INTERROGATIONS FROM THE BEGINNING

In this matter, Mr. Bush claims that he falsely confessed because he was beaten with a phone book by police.³⁹ While most law enforcement agencies videotape confessions, they do not videotape what led up to the confession.⁴⁰ All we see is the end product – a person sitting in front of a video camera confessing to the crime,⁴¹ powerful evidence before a jury for sure. But if jurors were able to see the suspect and the police from the minute they enter the station, they would have a fuller picture of the events that transpired.⁴²

According to the Innocence Project: Half the states in the country and the District of Columbia require recording of certain custodial interrogations either through statute or court action.⁴³ Federal law enforcement agencies, including the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), and Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), are required to record all custodial interrogations of individuals suspected of any federal crime.⁴⁴

The states that require recording of custodial interrogations are: Alaska, Colorado, Connecticut, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Texas, Utah, Vermont, and Wisconsin.⁴⁵ Numerous advocacy groups and Bar Associations have joined the call to make recording of custodial interrogations a national requirement,

³⁹ Gus Garcia-Roberts, *He spent 33 years in prison for a murder conviction based on a coerced confession concealed evidence, and biased detective*, USA TODAY (May 22, 2019), <https://www.usatoday.com/story/news/2019/05/22/keith-bush-innocent-prosecutors-move-vacate-1976-murder-conviction/3756361002/>.

⁴⁰ Saul Kassin & David Thompson, *Videotape All Police Interrogations*, N.Y. TIMES (Aug. 1, 2019), <https://www.nytimes.com/2019/08/01/opinion/police-interrogations-confessions-record.html?auth=login-google>.

⁴¹ *Id.*

⁴² *False Confessions and Recording of Custodial Interrogations*, INNOCENCE PROJECT, <https://www.innocenceproject.org/false-confessions-recording-interrogations/>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Brandon L. Bang, Duane Stanton, et al., *Police Recording of Custodial Interrogations: A State by State Legal Inquiry*, INTERNATIONAL JOURNAL OF POLICE SCIENCE AND MANAGEMENT (Jan. 10, 2018), <https://journals.sagepub.com/doi/abs/10.1177/1461355717750172?journalCode=psma>

including the ABA, the ACLU, the NAACP, and the National District Attorney's Association.⁴⁶ All states need to get on board.

VI. WHEN THE CRIMINAL JUSTICE SYSTEM GOES WRONG, IT GOES VERY WRONG

There is a lot to be proud of in our country's criminal justice system. But the system has many flaws as well – such as underfunding of indigent defense, reliance on plea bargains, overcrowding of dockets that lead to delays in trials.⁴⁷ The issue is that when something goes wrong, the impact is tremendous.⁴⁸ Air travel is an apt analogy. Flying is far safer and less accident-prone than driving.⁴⁹ But when an airplane accident happens, it is almost always horrific and catastrophic.⁵⁰ The same is true in the criminal justice system. Our criminal justice system gets it right far more often than it gets it wrong.⁵¹ But when it gets it wrong, someone's liberty is taken away, and the real criminal remains at large.⁵² Society needs to take whatever steps are necessary to ensure that the system is fair to all and that we are doing all we can to prevent wrongful conviction.

⁴⁶ *National Organizations – Recording Custodial Interrogations*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, (Feb. 25, 2019), <https://www.nacdl.org/Content/NationalOrgsonRecordingCustodialInterrogations>.

⁴⁷ Rodney Uphoff, *Convicting The Innocent: Aberration Or Systemic Problem?*, WIS. L. REV. 739 (2006).

⁴⁸ *Id.*

⁴⁹ Liz Weiss, *Why Air Travel is Actually Much Safer Than You Think*, U.S. NEWS (Aug. 25, 2016), <https://travel.usnews.com/features/why-air-travel-is-actually-much-safer-than-you-think>.

⁵⁰ Simon Ashley Bennett, *The Five Most Common Reasons For Airline Disasters*, THE CONVERSATION (Nov. 2, 2015), <https://theconversation.com/the-five-most-common-reasons-for-airliner-disasters-50100>.

⁵¹ Dollinger, *supra* note 1.

⁵² *Id.*